

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LESHANE J. HOLMES,

Plaintiff,

No. CIV S-04-1308 RRB EFB P

vs.

STEVE TEER,

Defendant.

FINDINGS AND RECOMMENDATIONS

Plaintiff is a prisoner without counsel seeking relief for alleged civil rights violations. *See* 42 U.S.C. § 1983. This action proceeds on the May 26, 2004, complaint¹ in which plaintiff alleges that (1) defendant Teer discriminated against plaintiff based on plaintiff's race by belittling him, assigning him to menial tasks while giving less qualified prisoners more difficult tasks, refusing to verify plaintiff's apprenticeship work hours, replacing plaintiff with a white prisoner and excluding plaintiff from a list of "critical workers" who were released from lock-down to perform essential tasks; and (2) defendant Teer fired plaintiff from his job as an electrician in retaliation for plaintiff's filing grievances against him. The matter is now before the court on defendant Teer's motion for summary judgment.

¹ Defendant removed this action pursuant to 28 U.S.C. § 1441(a). May 26, 2004, is the date plaintiff filed his complaint in state court.

1 **I. Facts**

2 Plaintiff does not state the time frame during which the alleged violations occurred.
3 However, the parties agree that on May 1, 1999, plaintiff commenced an apprenticeship to
4 become a maintenance electrician. Furthermore, defendant Teer has submitted evidence
5 showing that he was the foreman of plaintiff's Inmate Day Labor ("IDL") work crew (explained
6 below) from May 2002 until October 2003. Plaintiff has not disputed this evidence. Thus, the
7 court takes this to be the relevant time.

8 In order to understand these findings and recommendations, it is necessary to understand
9 the basic structure of and connection between the apprenticeship and the IDL programs. The
10 IDL is a joint venture program of the State of California that employs prisoners confined within
11 the California Department of Corrections and Rehabilitation (CDCR). Rau Decl., filed August
12 18, 2006, at 2; Melton Dec., filed August 18, 2006, at 1-2. This program permits employers to
13 provide job opportunities for prisoners so they can obtain skills and habits that will enable them
14 to be productive upon their release from prison. California Department of Corrections
15 Operations Manual ("DOM"), § 53140.1. All prisoners hired by IDL for construction projects at
16 CSP Solano are designated "general laborers." Rau Decl., at 2. General laborers must record
17 their hours and IDL staff must certify them. *Id.* Thus, regardless of having experience in a
18 particular vocation, a prisoner on an IDL crew may be directed to perform any and all tasks
19 necessary at a construction site. *Id.* at 2. The apprenticeship program provided more specialized
20 training. Prisoners participated in particular vocational educational courses within the CDCR in
21 order to obtain marketable skills. To become indentured, and apprentice was required
22 successfully to complete classes in the area of their vocation before embarking on an assignment.
23 DOM § 53090.4.7. After at least six months in an apprenticeship program and upon
24 recommendation by the educators, a prisoner apprentice is eligible to be assigned to day labor
25 projects. *Id.* In fact, an apprentice with the proper custody and classification levels must be
26 given priority with respect to day labor assignments. *Id.* However, an apprentice who is

1 assigned to IDL or other programs must continue to have “four hours of related instruction” each
2 week. Pl.’s Opp’n, filed September 12, 2006, Ex. D.

3 The facility apprenticeship coordinator makes all job assignments for apprentices. *Id.*
4 When an apprentice receives an assignment, the facility apprenticeship coordinator must give
5 written notice thereof to the classification committee, the prisoner’s counselor, the assignment
6 office and the prisoner. *Id.* The notice must also be placed in the prisoner’s central file. *Id.*
7 Other than removal for medical, custodial or legal reasons, an apprentice may not be removed
8 from his assigned training program without approval of the facility apprenticeship coordinator.
9 *Id.*

10 The parties agree that on November 1, 2003, all prison apprenticeship programs except
11 the HVAC/R program were discontinued. Pl.’s Opp’n, Exh. D; Melton Decl., at 2. Plaintiff has
12 submitted evidence that vocational instructors could follow particular guidelines to reinstitute
13 their particular program. Pl.’s Opp’n, Ex. D. There is no specific evidence that the electrical
14 apprenticeship program was reinstituted according to the applicable guidelines.

15 Prisoner apprentices must maintain a record of the hours worked toward satisfaction of
16 the apprenticeship agreement. Melton Decl., at 2. Only Vocational Instructors can verify that
17 these hours were completed. *Id.* ; Pl.’s Opp’n, Ex. D. While some apprenticeship work may
18 occur within IDL (explained below), the Apprenticeship Coordinator must approve it. Melton
19 Decl., at 3; *see also* Pl.’s Opp’n, Ex. D. Even within the apprenticeship program itself, a
20 prisoner must obtain permission from his supervisor to transfer from one work assignment to
21 another. Melton Decl., at 3. Voluntarily leaving an assignment without permission terminates
22 participation in the apprenticeship program. *Id.* With this overview, the court turns to the facts
23 of this case.

24 At all times relevant to this action, plaintiff was a prisoner at California State Prison,
25 Solano (CSP Solano). As stated, on May 1, 1999, plaintiff became an indentured apprentice in
26 the area of electrical maintenance. Compl., Ex. A; Melton Decl., at 2. He signed a formal

1 agreement requiring him to complete 6,000 hours between May 1, 1999, and May 1, 2002, to
2 record the hours he worked each day, and to have a Vocational Instructor verify his hours.
3 Compl., Ex. A; Melton Decl., at 2. Manuel Ibarra and, after Ibarra retired in June 2001, Spencer
4 Wong, were plaintiff's Vocational Instructors, i.e., apprenticeship supervisors. Melton Decl., at
5 2; Maiorino Decl., Ex. F, Pl.'s Dep. ("Pl.'s Dep."). For the third quarter of 2000, Manuel Ibarra
6 reported that plaintiff's work performance was above average. Compl., Ex. A. Plaintiff actively
7 participated in the apprenticeship program until at least sometime in March 2002. Pl.'s Dep.

8 In March 2002, plaintiff's only apprenticeship assignment was classroom-based. *Id.*,
9 Pl.'s Dep. at 5. Defendant submits evidence that plaintiff, without permission, left this
10 assignment in March 2002, and began working in the Metal Fabrication unit. Melton Decl., at 3.
11 At his deposition, plaintiff admitted that he left his vocational class in February 2002, explaining
12 that since his teacher, Manuel Ibarra, had retired he did not think he could learn anything more.
13 Pl.'s Dep. at 5. Plaintiff did not get permission from the Vocational Instructors, their supervisors,
14 the Apprenticeship Coordinator or from the Metal Fabrication Unit supervisor to make this
15 change.² *Id.*, at 9, 11, 12. While plaintiff did exclusively electrical work in the Metal
16 Fabrication Unit, Tom Melton, the Apprenticeship Coordinator, states in his declaration that
17 there are no written records showing that plaintiff had permission to transfer from one
18 assignment to another. *Id.*, at 12; Melton Decl., at 3. Plaintiff believed he did not need written
19 permission from his instructor to leave one assignment and go to the next. Pl.'s Dep. at 5, 9. He
20 also believed that he was assigned to the Metal Fabrication Unit as an apprentice. *Id.* Plaintiff
21 submitted evidence that he received a letter dated December 24, 2003, from Apprenticeship
22 Consultant Terri A. Lutz. Pl.'s Opp'n, Ex. F. Ms. Lutz sent to plaintiff booklets for recording
23 his apprenticeship-related work, requested information about plaintiff's program, and requested
24

25 ² On the bottom of a form styled, "Inmate Work Supervisor's Time Log," completed by
26 Vocational Instructor Wong, there is a notation stating, "03/05/02 - unassigned to MET - 3.093."
Maiorino Decl., filed August 18, 2006, Ex. D. The parties do not explain this notation.

1 that she, plaintiff and his instructor have a telephone conference. *Id.*

2 During the summer and fall of 2003, defendant Teer, an electrician with the International
3 Brotherhood of Electrical Workers (IBEW), was employed as Electrical Foreman for IDL at CSP
4 Solano. Teer Decl., filed August 18, 2006, at 1. Defendant Teer has never been a Vocational
5 Instructor at Solano State Prison or any responsibility or authority within that program. *Id.*, at 4.
6 Thus, he had no authority or responsibility to hire or fire any prisoner. *Id.*, at 3. He never was
7 responsible for verifying plaintiff's work or hours. *Id.*

8 From May 2002 until about October 2003, plaintiff was employed by IDL as a general
9 laborer. Rau Decl., at 2. When plaintiff was hired, IDL recognized his basic electrical training.
10 Maiorino Decl., Ex. B at 1. Teer submitted the declarations of Tom Melton and Brian Rau as
11 evidence that this employment was not associated with any apprenticeship program. Rau Decl.,
12 at 2.

13 Teer supervised a five-man IDL electrical crew working on new construction, repairs and
14 renovations. Teer Decl., at 2. Several other crews, i.e., electrical, masonry and sheet metal, each
15 with a supervisor, worked alongside Teer's crew. Pl.'s Dep. at 17. There also were prisoners
16 who worked solely on maintaining the IDL worksites, which involved picking up demolition
17 debris or carrying materials between job sites. *Id.* Plaintiff was on Teer's crew from about May
18 2002 until October 2003. Teer Decl., at 1-2. At deposition, plaintiff described a typical work
19 day as involving either a project or "small things to do," including running conduit, changing
20 panels, demolition and replacing "stuff," especially in the prison's medical facility, which was
21 being renovated. Pl.'s Dep. at 18. Teer's crew also replaced light fixtures, junction boxes and
22 completed other relatively small jobs associated with renovating an old facility. *Id.* Teer
23 believed that clean equipment and a clean work environment were necessary for safety reasons.
24 Teer Decl., at 1-2. Therefore, he required all the workers under his supervision, not just plaintiff,
25 regularly to clean the job site by picking up trash, sweeping, washing equipment and cleaning
26 light fixtures. *Id.* Plaintiff observed other prisoners sweep and pick up debris or trash before

1 leaving a work site, but he did not know whether Teer instructed them to do these tasks or not.
2 Pl.'s Dep. at 17. Plaintiff thought that only the maintenance crew consisted of "general
3 laborers," and that it was their job was to keep the work area clean. *Id.* Plaintiff submits the
4 declaration of a fellow prisoner who states that in August or September of 2002, he heard
5 defendant Teer tell plaintiff that he "would not authorize a jail-house electrician," and that
6 plaintiff "would do better in the trade as a black female." Pl.'s Opp'n, Ex. G. Shortly after
7 hearing these comments, he observed that plaintiff was performing tasks such as washing light
8 fixture covers and repairing damaged power cords on tools while less qualified prisoners, such as
9 a carpenter, were assigned to larger projects like installing conduit and installing power panels.
10 *Id.*

11 Plaintiff has submitted documentary evidence in the form of "Work Supervisor's
12 Reports" that for the quarterly periods of January through March 2003 and April through June
13 2003, an unidentified "supervisor" reported that plaintiff's work performance in IDL was
14 exceptional. *Id.* However, he also submitted evidence that defendant Teer maintained a written
15 record of plaintiff's poor attitude and job performance and his disrespect for other workers. Pl.'s
16 Opp'n, Ex. H. Defendant Teer asserts that plaintiff's productivity was low, quality of work was
17 poor, attitude and treatment of other prisoners were poor, and that he reported these concerns to
18 the IDL supervisory management staff. Teer Decl., at 3. The general foreman, Brad Baker, also
19 reported to his supervisor that plaintiff was causing friction with other workers and that his
20 "work habits became sloppy and very unproductive." Maiorino Decl., Ex. B at 1. In July 2003,
21 when Teer found that plaintiff's work was sloppy and advised him to correct it, plaintiff was not
22 receptive to the criticism. Teer Decl., at 3. Defendant Teer found at least two other electrical
23 jobs of plaintiff were so substandard that they violated the National Electric Code, the industry
24 standard. *Id.* at 4. In August 2003, an IDL supervisor, Brian Rau found that plaintiff did not
25 have a supervisor review his work on a transformer. Rau Decl., at 3. Rau examined the work
26 and found that plaintiff did not ground the wires entering a 480-volt conductor, which could have

1 resulted in an explosion. *Id.* When Rau discussed the problem with plaintiff, plaintiff attempted
2 to blame other IDL employees. *Id.*

3 In August or September of 2003, CSP Solano was placed on lockdown. Teer Decl., at 3.
4 Thus, prisoners were not released from their cells for job assignments. *Id.* At some point,
5 defendant Teer was permitted to select two prisoners to be on the list of “critical workers,” i.e.
6 workers who were permitted to return to their jobs. *Id.* Defendant Teer selected Sykes and
7 Mitchell, who are African American and Caucasian, respectively. *Id.* Several weeks later,
8 defendant Teer was permitted to select two more workers. He selected Monteon and Pullen, who
9 are Hispanic and Caucasian, respectively. Teer Decl., at 3. Before this, Monteon worked for the
10 IDL custody maintenance crew. *Id.* at 17. Plaintiff asserts that Monteon was not qualified to be
11 on the electrical crew because he was hired as a “general laborer” but “expressed an interest in
12 becoming an electrician.” Pl.’s Dep. at 26. Plaintiff “was very vocal” about his belief that
13 Monteon was unqualified to do electrical work, and admits that there was “friction” between
14 himself and Monteon. *Id.* He also told defendant Teer that since the IDL was not a vocational
15 class, it was not right for Monteon to be on the crew. *Id.* Teer responded that plaintiff should
16 help Monteon to learn, and paired Monteon with Pullen. *Id.* In his declaration, Teer asserts that
17 he did not select plaintiff as a critical worker because plaintiff was the least productive member
18 of the crew, had the most difficulty getting along with other crew-members, and caused
19 disruption amongst co-workers by being unjustifiably critical of their work. Teer Decl., at 3. At
20 his deposition, plaintiff admitted that he was critical of the other electrical workers. Pl.’s Dep. at
21 98-99. This was so, he explained, because they were not qualified and their work was
22 substandard, which made him concerned for the safety of the work site. *Id.*

23 On September 23, 2003, plaintiff filed a grievance against defendant Teer complaining
24 that he should have been selected as a critical worker. Pl.’s Dep. at 24. On October 1, 2003,
25 after the lockdown was lifted, plaintiff reported to the IDL crew. *Id.* He approached defendant
26 Teer to discuss his exclusion from the critical workers list. *Id.* At that time, defendant Teer said,

1 “You shouldn’t have wrote that 602.” *Id.* Plaintiff explained to Teer the grievance process and
2 his concerns about the apprenticeship and wanting critical worker status. *Id.* Teer responded by
3 telling plaintiff, “Well, I got to let you go.” *Id.* Plaintiff admits that Teer said that if it were
4 Teer’s decision to make, plaintiff would not be fired and that “higher ups” made the decision.
5 *Id.*

6 A letter dated October 9, 2003, from a construction supervisor to plaintiff informs
7 plaintiff that he no longer was part of the IDL crew with which he worked before the lockdown.
8 Maiorino Decl., Ex. A. The letter states that initially, a four-member crew was sufficient, but
9 that once they decided to add a crew member, that person would not be plaintiff. *Id.* The letter
10 states that the decision to replace plaintiff “was made by the lead electricians and myself,” based
11 on concerns of “the electrical supervisors about safety and work ethic.” *Id.* In his declaration,
12 defendant Teer states that he did not consider the newly hired prisoner, Bryant Fowlie, to be a
13 replacement for plaintiff. Teer Decl., at 4.

14 At deposition, plaintiff testified to his belief that Fowlie was hired to replace plaintiff
15 even though he was less qualified. Plaintiff believes that Fowlie was hired into the IDL ahead of
16 about 150 other prisoners on the waiting list. Pl.’s Dep. at 23. In support of this belief, he said
17 that Fowlie joined Teer’s work crew about two weeks after plaintiff left, but while plaintiff
18 officially was still assigned to it. *Id.* In addition, he explained, “[b]ecause the waiting list for
19 IDL, there are inmates on the IDL, waiting list that had been on the list for eight months before
20 they were called out there.” *Id.* Plaintiff never had seen the list. *Id.* Plaintiff testified that
21 Pullen was friends with Fowlie and tried to get Fowlie a job on the crew. *Id.* Plaintiff believed
22 that Fowlie was “enrolled in a professional career development institute course for being an
23 electrician,” and testified that Teer said that Fowlie was “just trying to learn how to bend
24 conduit.” *Id.* Plaintiff believes that Fowlie, who was white, was unqualified for the position
25 because Fowlie said that he had been hired as a carpenter. Pl.’s Dep. at 26.

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On March 9, 2004, IDL Construction Supervisor Steve Ponce drafted a document requesting that plaintiff be “officially unassigned from the Inmate Day Labor (IDL) construction crew.” Maiorino Decl., Ex. C. Ponce based the request on “written information” received from the previous supervisor and from plaintiff’s on-site supervisors stating that plaintiff’s poor attitude and substandard, unsafe work made Holmes not well suited for that particular crew. *Id.*, Exs. B, C. Ponce also noted that plaintiff had been excluded from the work-site since October of 2003. *Id.*, Ex. C. Finally, he noted that the evaluations reflecting plaintiff’s above average IDL performance were completed by a custody officer, not by a construction supervisor, and were inaccurate. *Id.*

In his declaration, defendant Teer denies ever having referred to plaintiff as a “prison house electrician.” Teer Decl., at 4. He also denies telling plaintiff that plaintiff should not have filed an appeal about his exclusion from the critical workers list. *Id.*

II. Standard for Summary Judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).³ The utility of Rule 56 to determine whether there is a “genuine issue of material fact,” such that the case must be resolved through presentation of testimony and evidence at trial is well established:

[T]he Supreme Court, by clarifying what the non-moving party must do to withstand a motion for summary judgment, has increased the utility of summary judgment. First, the Court has made clear that if the nonmoving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Second, to withstand a motion for summary judgment,

³ On February 4, 2004, the court informed plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), *cert. denied*, 527 U.S. 1035 (1999), and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

the non-moving party must show that there are “genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (emphasis added). Finally, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). No longer can it be argued that *any disagreement* about a material issue of fact precludes the use of summary judgment.

California Arch. Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir.), *cert. denied*, 484 U.S. 1006 (1988) (parallel citations omitted) (emphasis added). In short, there is no “genuine issue as to material fact,” if the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Grimes v. City and Country of San Francisco*, 951 F.2d 236, 239 (9th Cir. 1991) (quoting *Celotex*, 477 U.S. at 322). There can be no genuine issue as to any material fact where there is a complete failure of proof as to an essential element of the nonmoving party's case because all other facts are thereby rendered immaterial. *Celotex*, 477 U.S. at 323.

III. Analysis

“As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248, 252. Here, plaintiff’s action arises under 42 U.S.C. Section 1983, and the First, Eighth, and Fourteenth Amendments. To prevail at trial, he must prove that the defendants deprived him of his rights while acting under color of state law. To prove that his First Amendment right of access to the courts was violated, plaintiff must prove by a preponderance of competent evidence that he was denied necessary assistance in preparing and filing a habeas corpus petition or section 1983 complaint and that the deprivation actually injured his habeas or section 1983 litigation efforts. *Lewis v. Casey*, 518 U.S. 343, 351, 354, 356 (1996). To prove an Eighth

Amendment violation, plaintiff must show that the defendant knew plaintiff faced a risk of harm that “is not one that today’s society chooses to tolerate,” and that the defendant was “deliberately indifferent” to that risk. *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994). To prove a violation of the Equal Protection Clause, plaintiff must prove that the defendants intentionally discriminated against him based upon membership in a protected class. *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001); *Barren v. Harrington*, 152 F.3d 1193, 1194 (1998). For the reasons explained below, the court finds there is no genuine issue for trial.

A. Equal Protection

Plaintiff claims that defendant Teer made racially derogatory remarks to him, assigned him to menial tasks while giving less qualified prisoners more difficult ones, refused to verify plaintiff’s apprenticeship work hours, excluded plaintiff from a list of “critical workers” who were released from lock-down to perform essential tasks, and ultimately fired him, replacing him with a less qualified white prisoner. Defendant Teer contends there is no genuine issue about whether he acted with discriminatory intent.

The Fourteenth Amendment’s guarantee of equal protection is a command that states treat similarly situated persons alike. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (per curiam). This guarantee applies inside prison walls. *Lee v. Washington*, 390 U.S. 333, 333 (1968). The Supreme Court has made clear that when a prisoner alleges discrimination based on race, strict scrutiny applies. *Johnson v. California*, 543 U.S. 499, 509 (2005). The purpose of this level of scrutiny is to “smoke out illegitimate uses of race by ensuring that the government’s classification is closely fitted to the compelling goals that it seeks to achieve.” *Richmond v. J. S. Croson Co.*, 488 U.S. 469, 493 (1989). Thus, once a prisoner has come forward with evidence of intentional race-based discrimination, prison officials have the burden of proving by a preponderance of the evidence that the disparate treatment is a “narrowly tailored measure [] that further[s] compelling governmental interests.” *Adarant Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Washington v. Davis*, 426 U.S. 229, 239-240 (1976).

1 **B. Teer's Alleged Statements**

2 Plaintiff asserts that defendant Teer made racially derogatory remarks. If true, the
 3 statements of racial antipathy could serve as evidence of a racial motivation for the prison work
 4 assignments, hours and other actions he challenges. Verbal abuse alone is insufficient to
 5 establish an equal protection violation but it can be evidence of racial animus. *See Freeman v.*
 6 *Arpaio*, 125 F.3d 732, 738 & n. 6 (9th Cir. 1997). However, the statements alleged here fail to
 7 show any suggestion of racial animus.⁴ The complaint alleges that Teer frequently referred to
 8 plaintiff as a “prison house electrician” to emphasize that he received his electrical training while
 9 in prison. Compl. at 2. Indeed, the complaint alleges that the comment was motivated by
 10 plaintiff’s status as a prisoner. Prisoners are not a protected suspect class under the Fourteenth
 11 Amendment that would trigger an elevated of scrutiny. *City of Cleburne, Tex. v. Cleburne*
 12 *Living Center*, 473 U.S. 432, 440 (1985) (discrimination based on characteristics other than race,
 13 alienage, national origin and sex must be rationally related to a legitimate state interest). Here,
 14 however, under any level of scrutiny, plaintiff’s complaint does not state a claim. The verbal
 15 abuse he alleges is not remotely racial in nature. Therefore, no reasonable jury could find in
 16 plaintiff’s favor on this issue and defendant Teer is entitled to judgment as a matter of law.

17 **C. Discrimination at the IDL Worksite**

18 Plaintiff alleges that defendant Teer, knowing that plaintiff was an apprentice for
 19 electrical maintenance, assigned plaintiff to perform “menial chores and mundane tasks having
 20 little to no trade value whatsoever, such as, [sic] washing light fixtures, sweeping up trash, etc.,”
 21 but assigned tasks requiring electrical skills to those with less experience and training than
 22 plaintiff. Compl. at 2-3. Defendant contends that there is no triable issue because plaintiff has

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 24 ⁴ Defendant also points out that the alleged statement, “[y]ou would do better in the trade
 25 as a female,” was not racially motivated. Defs.’ Mot. for Summ. J. at 7. Regardless, plaintiff did
 26 not include this alleged statement in his complaint. The only statement that plaintiff seems to
 allege constitutes a freestanding violation of his rights is defendants’ repeatedly referring to
 plaintiff as a jailhouse electrician. Thus, the court does not consider whether the “doing better in
 the trade” remark, standing alone, violated plaintiff’s rights.

1 no "constitutional right to a prison job," and he was hired as a "general laborer," rather than as
2 an electrician. Def.'s Mot. for Summ. J. at 9-10. As a threshold matter, plaintiff does not
3 present this as a due process claim. For purposes of the Equal Protection Clause, it does not
4 matter whether there is a constitutional right to a job. The relevant question is whether
5 defendant treated plaintiff differently from similarly situated persons solely because of plaintiff's
6 race. *See Walker v. Gomez*, 370 F.3d 969, 973 (9th Cir. 2004) ("racial discrimination in the
7 assignment of jobs violates equal protection). It is undisputed that Teer was the electrical
8 foreman at the IDL construction site and that plaintiff was on Teer's crew. From these two facts,
9 it is reasonable to infer that defendant Teer's authority extended to projects requiring electrical
10 skills, and that plaintiff was assigned to assist with those projects. Thus, the only question is
11 whether defendant Teer excluded plaintiff from such projects because of plaintiff's race.

12 It is important to note that at trial, plaintiff has the burden of proving discriminatory
13 intent. *See Walker*, 370 F.3d at 973. Thus, in opposing this motion he must present evidence
14 that a reasonable fact finder could rely on at trial to "return a verdict for [him] on the evidence
15 presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248, 252. Defendant Teer has
16 submitted evidence that he believed a safe a work site must kept be clean, and that all crew
17 members were expected to help with a variety of tasks, such as digging trenches, removing
18 installation, concrete, sheet-rock or electrical materials. There is no evidence that these activities
19 are wholly unrelated to electrical work done during construction at a prison. Teer also has
20 submitted evidence that all crew members were expected to remove trash and debris, regardless
21 of an individual's level of electrical training and that he so directed them. Plaintiff has not
22 shown a genuine issue in this regard. At his deposition he conceded that he saw other crew
23 members picking up trash and the like. He also admitted that he did not know if defendant Teer
24 had directed them to do it or if they were acting on their own initiative. Plaintiff adduces
25 evidence, which defendant Teer disputes, that Teer told plaintiff that he "would not authorize a
26 jail-house electrician," and that plaintiff "would do better in the trade as a black female."

1 Plaintiff's evidence, also disputed by Teer, shows that shortly after Teer made these statements,
2 plaintiff was assigned to perform tasks such as cleaning light fixture covers and repairing broken
3 tools while prisoners with less electrical experience than he worked on larger, more complex
4 projects. This dispute, however, is not material. Even if a jury found plaintiff's evidence to be
5 true, it does not create a genuine issue about whether Teer acted out of racial animus. As
6 explained above, the "jail-house electrician" statement singles out prisoners, not African-
7 Americans, or even African-American prisoners. The "black female" comment alluding to race
8 and sex, is too thin a reed upon which to find a genuine issue of material fact in light of the other
9 evidence. Perhaps a reasonable jury could conclude that Teer disliked plaintiff. However,
10 personal animosity does not violate the Equal Protection Clause. The evidence presented could
11 not justify a finding that defendant Teer directed plaintiff to perform jobs other than those
12 directly utilizing plaintiff's electrical skills because of plaintiff's race. Teer is therefore entitled
13 to judgment as a matter of law on this claim. *Celotex*, 477 U.S. at 322; *Anderson v. Liberty*
14 *Lobby, Inc.*, 477 U.S. at 248, 252.

15 **D. Teer's Refusal to Verify Plaintiff's Work Hours**

16 Plaintiff alleges that defendant Teer prevented him from completing his apprenticeship
17 by refusing to verify the hours he worked so that he could report those hours within the
18 apprenticeship program. Compl. at 3. Defendant Teer argues that plaintiff's IDL work was not
19 part of an apprenticeship. It is undisputed that CDCR policies would have permitted an
20 apprentice in the Electrical Maintenance program to work in IDL. But it is immaterial whether
21 plaintiff was an apprentice who worked within IDL. Defendant Teer has submitted evidence that
22 only Vocational Instructors could verify an apprentice's hours, and he was not a Vocational
23 Instructor. Plaintiff has not submitted any evidence that defendant Teer was required to confirm
24 that plaintiff worked certain hours so that plaintiff could rely on his IDL work for his
25 apprenticeship. Moreover, there is no evidence to even remotely suggest that Teer's failure to
26 verify hours had anything to do with the plaintiff's race. Without evidence that defendant Teer

1 had the authority to verify hours worked in the apprenticeship program, or more improperly that
2 he treated plaintiff differently (e.g., verified hours for others but not plaintiff) because of racial
3 animus, no reasonable jury could find for plaintiff on this claim. Accordingly, defendant Teer is
4 entitled to judgment as a matter of law on this claim. *Celotex*, 477 U.S. at 322; *Anderson v.*
5 *Liberty Lobby, Inc.*, 477 U.S. at 248, 252.

6 **E. Exclusion from the Critical Workers List**

7 Plaintiff claims that defendant Teer excluded him from the critical workers list because of
8 his race. Defendant Teer asserts that he selected critical workers based on work performance
9 and attitude. Again, as the party with the burden of proof at trial, plaintiff must be able to
10 produce evidence that this exclusion was the result of intentional, invidious discrimination. It is
11 undisputed that Teer's entire crew consisted of two Caucasian workers, two African American
12 workers and one Hispanic worker. Defendant Teer has submitted evidence that he was permitted
13 to select two prisoners at a time to be critical workers. When given his first opportunity, he
14 selected one African American and one Caucasian worker. When given his second opportunity,
15 he selected one Hispanic and one Caucasian worker. That defendant Teer selected an African
16 American as one of his two initial critical workers when there were five possible candidates
17 tends to show that race was not a factor in excluding plaintiff. Again, while it is possible that
18 Teer disliked plaintiff, mere dislike does not violate the Equal Protection Clause. There is no
19 evidence to establish a racial motivation here.

20 In addition, defendant Teer has submitted evidence that plaintiff's work was so
21 substandard that at times it violated national standards for the safety of electrical work. He also
22 has submitted evidence that plaintiff did not get along well with the other crew members because
23 he was unjustifiably critical of their work. Plaintiff asserts that defendant Teer has no records or
24 other documentary evidence suggesting that plaintiff's work was inadequate, and has submitted
25 evidence that plaintiff's work in January through March and April through June 2003 was more
26 than satisfactory. But plaintiff does not submit any work performance reports from June 2003

1 through September 2003, the period immediately preceding the lockdown. Nor does he submit
2 evidence showing that the specific work Rau and Teer described as falling below national
3 standards actually was completed satisfactorily. Finally, plaintiff concedes that he criticized
4 other members of the IDL crew for their work. His assertion that he was justified in doing so
5 because he was the only one with electrical training does not create any dispute about whether
6 his criticism was misplaced if only because it caused friction on the crew. On this evidence, a
7 reasonable jury could not conclude that plaintiff's race was the motivating factor behind Teer's
8 declining to select plaintiff as a critical worker following the lockdown. Therefore, Teer is
9 entitled to judgment as a matter of law on this issue. *Celotex*, 477 U.S. at 322; *Anderson v.*
10 *Liberty Lobby, Inc.*, 477 U.S. at 248, 252

11 **F. Decision to Fire Plaintiff**

12 Plaintiff claims that defendant Teer fired him from the IDL crew because of plaintiff's
13 race. Teer asserts that he did not make the decision to fire plaintiff and that in any event,
14 plaintiff presents no evidence to prove discriminatory intent. It also is undisputed that when
15 Teer was ready for five crew members after the lockdown, plaintiff was not hired. Instead, a
16 white prisoner named Fowlie was hired. It is undisputed that defendant Teer lacked authority to
17 hire and fire prisoners. This was the job of prison officials. However, there is evidence that a
18 prison supervisor informed Teer that his opinions about plaintiff would heavily influence any
19 decision about whether to retain or discharge plaintiff. Thus, Teer had a great amount of
20 influence over whether plaintiff remained on the crew. For purposes of summary judgment, the
21 court deems Teer's influence over this decision sufficient to confer liability on him. However,
22 plaintiff has not submitted any direct evidence that Teer communicated any preference to the
23 supervisors. The evidence is that Teer told plaintiff both that supervisors made the decision and
24 that Teer told plaintiff that he had to "let plaintiff go." For purposes of summary judgment, the
25 court takes the evidence in the light most favorable to the non-moving party, plaintiff, and finds
26 that Teer's opinions were a motivating factor behind his supervisors' decision to remove plaintiff

1 from his work crew. However, this does not establish that plaintiff was fired because of his race.

2 Plaintiff's beliefs about why Fowlie was hired in plaintiff's stead are insufficient to
3 withstand defendant's motion. Plaintiff testified at deposition that Teer wanted Fowlie on the
4 crew, Fowlie "circumvented" the waiting list for that particular position, Fowlie was white, and
5 Fowlie was less qualified than plaintiff. Since plaintiff has the burden of proof at trial and
6 defendant's motion is properly supported, plaintiff cannot survive summary judgment based on
7 unsupported beliefs. He introduces no direct evidence whatsoever about Fowlie's qualifications,
8 whether Fowlie was not in fact next on the waiting list for the job, or if he was not, that there
9 was no reason to justify that decision. Furthermore, as discussed above, plaintiff's evidence that
10 his work performance was above average does not cover the time immediately preceding the
11 lockdown and is contradicted by his own evidence that his performance was substandard.
12 Plaintiff does not submit evidence to contest Teer's evidence of plaintiff's substandard work on
13 several projects, and plaintiff caused friction on the crew. On this evidence, no reasonable jury
14 could find that defendant Teer either caused plaintiff to be removed from the crew, or caused
15 Fowlie to be hired in plaintiff's stead, based on racial animus. Accordingly, defendant Teer is
16 entitled to judgment as a matter of law on this claim. *Celotex*, 477 U.S. at 322; *Anderson v.*
17 *Liberty Lobby, Inc.*, 477 U.S. at 248, 252

18 **G. Retaliation**

19 Plaintiff claims that defendant Teer fired plaintiff in retaliation for filing a grievance
20 about not being selected as a critical worker. Defendant Teer contends that plaintiff cannot
21 adduce evidence that being discharged from the work crew was connected to the grievance he
22 filed. There are five elements to a retaliation claim: (1) an assertion that a state actor took some
23 adverse action against a prisoner; (2) because (3) the prisoner engaged in protected conduct; (4)
24 resulting in the chilling of plaintiff's First Amendment rights; and (5) the action did not
25 reasonably advance a legitimate penological goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68
26 (9th Cir. 2003). Institutional order and discipline are legitimate penological goals. *Rizzo v.*

1 *Dawson*, 778 F.2d 527, 532 (9th Cir. 1985). It is undisputed that plaintiff was discharged from
2 Teer's work crew after the lock-down. It is undisputed that in September 23, 2003, plaintiff filed
3 a grievance about not being selected as a critical worker. Pl.'s Dep. at 24. Plaintiff adduces
4 evidence that on October 1, 2003, when he returned to the IDL work site, he went to speak with
5 Teer about being excluded from the critical workers' list. *Id.* Plaintiff testified at deposition
6 that Teer told plaintiff that he believed the grievance was personal, and then said that he had to
7 "let plaintiff go." *Id.* However, defendant Teer has submitted evidence that he legitimately was
8 concerned about the quality of plaintiff's work and plaintiff's ability to work well with other
9 crew members. In the context of a prison work site, good work and the ability to work well with
10 others are legitimate goals equivalent to discipline and order. On the evidence before the court,
11 no reasonable jury could find that Teer lacked a legitimate penological reason for having
12 plaintiff removed from the work crew. Accordingly, Teer is entitled to judgment as a matter of
13 law. *Celotex*, 477 U.S. at 322; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248, 252

14 For these reasons, it is RECOMMENDED that defendant's August 18, 2006, motion for
15 summary judgment be granted and that judgment be entered in his favor.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days after
18 being served with these findings and recommendations, any party may file written objections
19 with the court and serve a copy on all parties. Such a document should be captioned "Objections
20 to Magistrate Judge's Findings and Recommendations." Failure to file objections within the
21 specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158
22 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

23 Dated: August 29, 2007.

24
25 
26 EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE